

Lisa Swan Semansky
SEMANSKY LAW OFFICE
P.O. Box 3267
14 Fifth Street South
Great Falls, MT 59403-3267
Hearing Officer

IN RE THE MATTER OF [THE STUDENT]) CAUSE NO. OSPI-2005-01E

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The request for an expedited impartial due process hearing was made by the School District of [city] pursuant to the procedures established under Part B of the Individuals with Disabilities Educational Act (IDEA). The request was made on February 2, 2005. This hearing's officer was contacted on the afternoon of February 2, 2005. The expedited impartial due process hearing in this matter was held on February 4, 2005 at the [District] High School.

District Principal ***** and Special Ed Director ***** were present at the hearing. [Father] and [Mother], parent's of the minor, [the student] were present. The minor was not present.

The hearing officer took witness testimony and accepted exhibits at the hearing. An audio tape recording was made of the proceeding and transcribed. Based upon the testimony of witnesses and exhibits that were received into evidence, the hearing's officer makes the following findings of facts and conclusions of law.

FINDINGS

1. [The student] a sophomore at [the District] High School has been identified as having a learning disability of emotionally disturbed and an IEP was established for him on

September 17, 2004 for the current school year. The current IEP was introduced into evidence as Family Exhibit #1. The child study team, which included the parents participated and consented to this IEP.

2. [The District Principal] testified that since the beginning of school [the student] has had 19 days of school suspension. The school suspensions have fallen into four categories. The initial 5-day suspension occurred November 30, 2004 for profanity, gross disobedience and gross insubordination. Offered into evidence and accepted as School Exhibit #2 is the school district's documentation of their disciplinary actions regarding this child. Included in School District Exhibit #2 is a letter to the parents/guardian of [the student] on indicating that there would be a manifestation hearing on Thursday, December 9th at 9:00 a.m. to consider if his actions resulting in the 5-day suspension were a result of his disability. [The parents] both testified that they did not have notice of the manifestation determination review that was held on that date. The letter contained in School Exhibit #2 is not addressed to a specific person, nor is there anything on it or in the other documents of the Exhibit to show that this letter was delivered to [Father] or [Mother].

3. The school's testimony was that the manifestation determination review was noticed on November 30, 2004 and held on December 9, 2004. The results of the manifestation determination were submitted as School Exhibit #1. [The parents] both deny receiving notice of the manifestation determination review, attending the manifestation determination review or receiving a copy of the results of the manifestation determination, that is, School Exhibit #1. Although both [the District Principal] and [the Special Education Director] stated that notice was given, neither could state affirmatively how or when such notice was given. Everyone who

attended the review who testified at the hearing agreed that the parents did not attend the manifestation determination review.

4. [The special education director] testified that the manifestation determination review was held on December 9, 2004 and that the suspensions that were the subject of the manifestation determination (13 days) were found to not be a manifestation of the student's disability. With the exception of the parents, the child study team attended the manifestation determination review. [The special education director] testified that instead of the parents, **** represented [the student]'s interest as [the student] was living with **** at the time. No testimony was offered that disputed this.

5. The parents testified that they did not receive a copy of the manifestation determination review decision regarding their son's behavior that resulted in suspensions. The parents also testified that they were not kept apprized of all the suspensions that have occurred this school year.

6. [The special education director] testified that on January 25, 2005 the child study team was going to have another manifestation determination as [the student]'s suspensions were reaching the 10-day limit again. However, that hearing was not held. Again [the parents] testified they knew nothing about this proposed manifestation determination review.

7. [The District Principal] testified that since the beginning of school [the student] has had 19 days of suspension. Thirteen days of suspension occurred prior to the manifestation determination review held on December 9, 2004, and six days of suspension have occurred since the manifestation determination review.

8. [The District Principal] testified about the suspensions and the disciplinary procedure that was followed is set forth in the [the district] High School Code of Conduct. [The

District Principal] further testified that the suspensions have fallen into four categories, profanity, gross disobedience, gross insubordination and dangerous conduct. He testified that all actions of discipline, whether detention or suspension, have been sent to the parents through the mail. He further testified that the suspension notices were hand delivered by the Home Room Coordinator.

9. [Father] testified that he requested an IEP team meeting for modification of the IEP sometime before Christmas. [Father] testified that he made this request to [the special education director], [the district principal] and to the superintendent. They agreed but no team meeting for a possible modification of the IEP has been held. No provisions for makeup work or sending work home with the student were made for any of the suspensions except in [teacher #1's] class. [Teacher #1] testified that he advised [the student] of the work missed and scheduled to get it in for makeup. The school testified that due to the length of the suspensions the school handbook does not require them to do anything about making up missed work. [Teacher #1] acknowledged that providing the missed work was something he did on his own, it was not required of him by administration.

10. The principal and special ed director continued to maintain that the suspensions that have occurred with regard to the child's behavior are not a manifestation of his disability and wish to be able to continue to proceed with the disciplinary actions provided in the school's code of conduct. The parents dispute that reasoning and have requested a modification of his IEP in order to alleviate or eliminate [the student]'s continued suspensions from school.

From the above Findings, the Hearing Officer makes the following

CONCLUSIONS OF LAW

1. Under IDEA and Implementing Regulations, including Montana Administrative Rules, the Montana Superintendent of Public Instruction has jurisdiction to hold an impartial due process hearing with respect to complaints about school disciplinary procedures as applied to an eligible child with a disability and the requirements of providing a free appropriate public education to that child. *34 CFR 300.528(1)* and *10.16.3528 ARM*. The hearing officer has jurisdiction under IDEA Part B to hear and decide the issues that have been presented for decision. The primary issue is whether the suspensions that have occurred with regard to this current school year for [the student] constituted a change of placement under *34 CFR 300.519*.

2. The Individuals with Disabilities Education Act Part B assures an eligible child with a disability a free appropriate public education. The child's individualized education program (IEP) is the means by which a free appropriate public education is achieved. *See 20 U.S.C. 1411-1420*.

3. *34 CFR Section 300.519(b)* provides that a change of placement occurs if the child is subjected to a series of removals that constitute a pattern because they have accumulated to more than 10 school days in a school year, and because of factors such as the length of each removal, the total amount of time the child is removed and proximity of the removal to one another. *See Also, Section 20-5-202(1) MCA (2003)*.

4. If a child with a disability has been removed from his or her current placement for more than 10 school days in the same school year, during any subsequent days of removal, the public agency must provide services to the extent required under IDEA by providing an appropriate interim alternative education setting for the same amount of time the child without a disability would be subject to discipline. *34 CFR Section 300.520*. Once the child has been removed for more than 10 school days in a school year, the IEP team needs to meet and review the behavioral intervention plan or if there is no behavioral intervention plan modify the IEP and

address the behavior in the IEP. In short, the IEP team needs to make whatever modifications to the IEP as are necessary under the circumstances. *See 34 CFR Section 300.520.*

5. In addition, pursuant to *34 CFR Section 300.523*, once the child has missed 10 school days, the IEP team and other qualified personnel must meet to consider if the action which has resulted in the 10 days of suspension from school are a manifestation of the child's disability. *34 CFR Section 300.523*. The parents must be notified of the manifestation determination review and given a copy of the determination so as to be provided the procedural safeguards which includes the right to request a due process hearing as outlined in *34 CFR Section 300.504*.

6. There was no evidence presented that the school district wanted to or attempted to place [the student] in an alternative placement during any of his suspensions. In fact, the evidence was that they made no effort to place him in any kind of alternative placement or worked with him to keep his school work current during his suspensions¹.

7. [Father] did not dispute the suspensions or that his son had the behavior that resulted in the disciplinary actions. However, he argued that the child should have been provided with the ability to make up the work or given the assignments so he could stay current with his homework which in fact would mean that during the suspensions he should be placed in an alternative placement. *34 CFR Section 300.514(a)* requires that unless the alternative placement is agreed upon between the school district and parents, the disabled child must "stay put" which means that the school district cannot unilaterally suspend a disabled student for more than 10 days. This child, without question, has been suspended for 19 days as of the hearing date.

¹[Teacher #1's] class may be the exception.

8. Although the school tried to say the suspensions were for different kinds of conduct, the conduct is so intermingled as to be considered the same except the last 3-day suspension for lighting the firecracker. *See School Exhibit #2.*

9. Despite the presence of ****, with whom apparently [the student] was residing at the time of the manifestation determination review, the federal regulations and administrative rules of Montana require that the parents be notified of the review and allow to participate as members of the child study team. No testimony was presented that affirmatively and conclusively stated that notice was provided to [the student]'s parents; no documentation was provided showing notice was given to them. Therefore, no manifestation determination review was held and this child suffered a change in placement under *34 CFR Section 300.519*. The school district is obligated to immediately conduct an IEP to develop an assessment plan for behavioral intervention. The parents had previously requested that an IEP meeting be convened to develop appropriate behavioral intervention and implement those interventions.

IT IS HEREBY ORDERED THAT:

1. The [District] High School Administration did not have the authority under the circumstances presented to continue to suspend [the student] for the nine days of suspension following the initial 10 without convening the CST for modification or consideration of an assessment behavior plan under the child's current IEP.

2 [The student] cannot be suspended without an appropriate interim alternative educational setting with the parents agreement as to the placement for the same amount of time in the interim it takes to convene the IEP and conduct a functional behavioral assessment and if necessary implement a behavioral intervention plan for the child. *See 20 USC 1415(k)4; 34 CFR 300.523(f).*

3. The school district may hold another manifestation determination review if the child is subject to discipline again. The parents must be notified and invited to attend. If the review determines that the behavior of the child with the disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child. However, since this child has already been removed from his current placement for more than 10 days in the school year, the school must, for the remainder of the removals, provide services to the extent necessary to enable the child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals set out in his IEP.

DATED this 15th day of February, 2005.

LISA SWAN SEMANSKY
DUE PROCESS HEARING OFFICER

CERTIFICATE OF SERVICE

I, hereby certify that a copy of the foregoing **PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served upon the person named below by mailing, hand-delivery, Federal Express, or by telecopying to him a true and correct copy of said document.

☒ U.S. Mail ☐ Federal Express ☐ Hand-delivery ☐ Fax

ORIGINAL DELIVERED TO

[The parents]
[Address]

Office of Public Instruction
Legal Division
ATTN: Linda Brandon
P.O. Box 202501
Helena, MT 59620-2501

ATTN: [District Principal]
[Address]

Dated this 15th day of February, 2005.

For Lisa Swan Semansky